SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1922

CENTRAL OF GEORGIA RAILROAD COMPANY,
Petitioner,

versus

JAMES E. HENDLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent, James E. Hendley, files this brief in opposition to the petitioner's prayer that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

QUESTION PRESENTED

May a United States District Court protect from discharge a railroad employee witness who furnished information and testified by deposition in a Federal

Employers' Liability Act case by enjoining a disciplinary hearing of the railroad scheduled to be conducted after the conclusion of the FELA case where the investigation violates provisions of the Act intended to protect employees who furnish information pertaining to FELA claims?

STATEMENT

This action was brought to enjoin the firing of an employee with over 25 years service as a switchman with the Central of Georgia Railroad Company when he was summarily discharged from his job one day after the conclusion of the FELA case of *Daniel Razook v. Central of Georgia Railroad Company and Union Camp Corporation.*[1] Razook had filed a claim under the FELA against Central based on an injury sustained by him on the Union Camp Corporation premises in Savannah, Georgia. The injury occurred at night, and Razook was confused as to the layout and track numbers where he was injured while on duty as an employee of the Central of Georgia Railroad Company. He called upon his union Local Chairman, respondent Hendley, to assist him in establishing the correct track number and location by meeting him while both employees were off duty at the Union Camp premises in Savannah.[2] Hend-

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1 *Daniel Razook v. Central of Georgia Railroad Company and Union Camp Corporation,* Civil Action Number 12233-C, Superior Court of Chatham County, Georgia.

2 Hendley had served as Local Chairman of the United Transportation Union for over 6 years and was charged with the responsibility to assist Union members in preserving their employee rights. See, e.g. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company,* 305 F.2d 605 (5th Cir. 1962).

ley met Razook at the Union Camp premises and informed him of the correct number of the track on which Razook was injured. Razook had his attorney along and the attorney attempted to record the track identity and location by photograph.

Hendley later was called by the Railroad as a witness and gave deposition testimony in the *Razook* case on November 11, 1977. On December 1, 1977, one day after the conclusion of the *Razook* FELA case, Hendley received a letter from the Railroad charging him with "disloyalty" and violation of Rule R of the operating rules of the Railroad.[3] Central's Rule R as applied to this case provides:

> "Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information."[4] (Ibid)

Hendley through counsel advised the Railroad by letter that the FELA, 45 U.S.C. §60, forbade this re-

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3 The full text of the letter charging Hendley with employee Rule violations appears in Appendix B.

4 The operating rules of the Central of Georgia Railroad appear in a looseleaf booklet published by the Southern Railway System of which the Central is an entity. Rule R as it appears in full in the operating rules is as follows:

R. Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipment of freight, which information might be used to the disadvantage of the patrons of the Railroad.

Information detrimental to the Company's interests must not be divulged except to the proper officers or to others authorized to obtain such information.

prisal action. Central nonetheless scheduled a disciplinary hearing for December 8. The case at bar was then filed to enjoin Central from conducting a retaliatory disciplinary hearing purposed to harrass Hendley for his role as a witness in an FELA claim on the ground that this particular application of Rule "R" and the dragnet "disloyalty" charge violated Section 60.

The case was submitted to the District Court on briefs. The Court denied the request for an injunction and dismissed the complaint on the grounds that it lacked jurisdiction over this "minor" labor dispute because the Railway Labor Act gave primary exclusive jurisdiction over such matters to the Railway Adjustment Board, and that 45 U.S.C. §60 did not empower the Court to prevent the Railroad from punishing a local union chairman who assisted a fellow employee in investigating an FELA claim after the claim was resolved. Whether the National Railway Adjustment Board administrative law process provided for the protection of rights under 45 U.S.C. §60 to certain conduct was not addressed in the court opinion. Rather, the District Court focused on the operation of the administrative grievance machinery to settle minor labor disputes such as the discipline of an employee which ordinarily by virtue of the Railway Labor Act, 45 U.S.C. §153, come under the exclusive jurisdiction of the National Railway Adjustment Board. The District Court glossed over the singular distinction here that the focus of Hendley's discipline charge regarded not a labor dispute or even any misconduct as an employee,

but his role as a witness furnishing information while off duty to a member of his union local who used the information to present an FELA claim. The Court concluded that "[t]he dispute involved in this case was part of the ordinary, diurnal grist of employee/employer relations," in that "[t]he questions involved in the disciplinary investigation include whether or not the conduct complained of constituted disloyalty"; and "[s]uch questions of fact (or law) are determinable under established grievance and arbitral procedures, contractural and statutory." (Petitioner's App. D, pp. 23a-24a). The District Court denied Hendley's request for injunctive relief.

Central held its investigation. Based on charges of "disloyalty", Hendley was discharged for his role in assisting Razook in the preparation of his FELA claim. Hendley sought review of the Railroad's decision by a Public Law Board under the Railway Labor Act, 45 U.S.C. §153(2), and since implicitly the District Court ruled that a Public Board would be the forum to determine whether and how that FELA statute applied, he was relegated to raising and having determined on the merits his claim of violation of 45 U.S.C. §60 by that administrative board. Oddly, the District Court by default caused the application of a vital FELA statutory protection to be left for determination by an administrative agency lacking both the skill to adjudicate statutory construction and the power to enforce statutory sanctions. The Board of course did not attempt to rule on the application of 45 U.S.C. §60, and properly so, it

being out of their area of expertise, but did find Central's discipline of Hendley wrongful in principle and ordered him reinstated immediately.

In the interim the order of the District Court had been appealed, and the United States Court of Appeals for the Fifth Circuit was the only forum in which the depositions, affidavits, court order, public law board award, and carrier investigation transcript were available for simultaneous consideration. The Court of Appeals made a thorough, exacting review of the record. The Court defined the precise question to be whether a Federal Court had jurisdiction after the conclusion of an FELA case to enjoin a disciplinary hearing alleged to be used by a Railroad for retaliatory purposes in violation of 45 U.S.C. §60, and held that the question of whether a particular disciplinary hearing does violate Section 60 involves an interpretation of a Federal Statute, and therefore is a matter of Federal jurisdiction. (Petitioner's App. B, pp. 8a-11a). The Court was careful to note that the issue before the Court "does not involve interpretation of a collective bargaining agreement, an appropriate matter for resolution by arbitration. Rather, the question is whether a disciplinary hearing brought in accordance with the procedures established in the collective bargaining agreement violates Federal Statutes." (Id. p. 11a). It concluded, "[t]his is a matter properly within the jurisdiction of Federal Courts and is not a question to be determined by the administrative board" (Id. p. 11a). The Court observed that "Section 60, like Section 152 Third [of the Railway Labor Act], is a specific prohibi-

tion of a certain conduct by a Railroad;" (Id. p. 13a), and held that "[a] District Court's ability to enjoin a hearing or conduct which violates Section 60 is essential to effectuate the purpose of the Section." (Id. p. 13a). "If a Railroad is allowed to discipline an employee for furnishing information to an FELA Plaintiff, and the employee is required to submit to the hearing and to process his claim through arbitration before finally reaching the Federal Courts, the coercive effect is overwhelming." (Id. p. 14a). The Court pondered the chilling effects that the Central's actions against Hendley would have on other employees who would consider testifying in an FELA case and whether it would serve as a device the "effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest." (Id. p. 14a). Contrary to the petitioner's repeated suggestion in its brief, the Court specifically limited the scope of its holding, declaring that "we do not hold that an employee may never be disciplined for his conduct in connection with an FELA case." (Id. p. 15a) The Court identified several instances where such disciplinary action would be warranted, but merely held that the Federal Court had jurisdiction to determine whether the disciplinary hearing is brought purely for purposes violative of Section 60, or whether the Railroad is attempting to discipline the employee for violation of lawful company rules. (Id.) The Court concluded that the actions of Hendley which were the subject of the investigation were within the protection of Section 60, and that being within the ambit of that protection, Hendley's conduct as a witness could not lawfully be the subject of disciplinary action and arbitration. The

Court reversed the District Court decision and remanded holding that the District Court did have jurisdiction after the conclusion of the FELA case to enjoin a proceeding which violates Section 60. The award of the National Railroad Adjustment Board was ordered to be set aside to the extent that it did not grant Hendley back pay for the time that he was suspended or unemployed.

Central petitioned for rehearing en banc to the United States Court of Appeals for the Fifth Circuit. The petition was denied.

REASONS FOR DENYING THE WRIT

I.

The decision below upholds the clear legislative intent of 45 U.S.C. §60, and traces carefully the distinction fundamental to the federal regulatory scheme between labor disputes relating to employee interests arising from collective bargaining agreements that are proper subjects for administrative resolution on the one hand and legal issues centering on the interpretation of legal rights and remedies granted by statute which the federal courts are peculiarly equipped to adjudicate. Whether Section 60 implicitly creates a civil remedy does not determine federal court jurisdiction in this instance. Hendley seeks not a civil remedy, but protection by a redress that Congress delegated to the court. The United States Supreme Court recognized in *Texas and N.O. Railroad Company v. Brotherhood of Railway and Social Security Clerks*, that:

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded." 281 U.S. 568, 50 S.Ct. 433, 74 L.E. 1034.

Fundamental to our system of laws is the principle that the creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. This is true whether the prohibition be one of interference or coercion in connection with the choice of union representatives, or the exercise of rights as union representatives to assist or volunteer information regarding an FELA claim. The right is created and the remedy exists. *Marbury v. Madison*, 1 Cranch 137, 162, 163, 2 L.E. 60; *Texas and N.O. Railroad Company*, supra. Section 60 was enacted as part of the Federal Employers' Liability Act, not the Railway Labor Act, so that its enforcement falls under Section 56 of the Act which gives United States District Courts jurisdiction to prohibit violations. The District Court below did recognize that Congress intended that an injured employee be able to obtain readily information from witnesses, particularly employees of the Railroad, the statute being purposed "to prevent the coercion of employees upon whom an employee-claimant depends to substantiate his claim against the Railroad." (Petitioner's Appendix D, p. 20a, citations omitted). Under the construction of the Railway Labor Act suggested by the petitioner, the right created

under Section 60 would be illusory in that a claimant or witness such as Hendley must languish before an administrative law board that lacks the jurisprudential skill to interpret the right and lacks the power to apply the statutory protection. To read out of Section 60 a right of protection by a federal court under the Federal Employers' Liability Act results in a right created without a remedy, making enaction of the Section pointless, and ignores the legislative intent of Section 60.

II.

The 76th Congress in 1939 conducted hearings on legislation proposed by President Roosevelt to determine whether significant abuses existed on the part of Railroad carriers in discouraging would-be claimants from pursuing their rights provided by the Federal Employers' Liability Act for injuries sustained during their employment with the Railroad. Information was submitted by the Railroads and employee unions. Senate Report number 661 that accompanied Senate Bill 1708 from the committee on the judiciary states the objectives of the Bill that was later adopted as Section 10 of the Federal Employers' Liability Act, 45 U.S.C. §60:

> "It prohibits the promulgation or enforcement of rules which penalize railroad employees for giving information concerning accidents to the injured person or his representative."

The report as it relates to the amendment to Section 10 identified exactly the type problem confronting Hendley:

> "A substantial number of railroads subject to the Employers' Liability Act have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them." Senate Report 661 at page 5.[5]

Rule R of the Railroad's Operating Rules provides in pertinent part:

> "Information detrimental to the company's interests must not be divulged except to proper officers or to others authorized to obtain such information." (Appendix A, p. 2a)

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5 The Senate Bill number 1708 was approved by the conference committee reported in conference report number 1463, dated August 4, 1939. The Bill as it came out of the conference committee was approved by the House and the Senate, was examined and signed into law by the President. It appears as Section 10 of public law 76-382, an adjunct of the Federal Employers' Liability Act now appearing as 45 U.S.C. §60.

The Railroad here relied on this rule to discipline an off duty employee for giving information regarding a correct track location which was a material fact in an FELA claim, charging him with "disloyalty", a term so vague it is meaningless. Rule R on its face violates Section 60. The prohibition of rules such as Rule R which seek to censor the release of information was identified by the United States Supreme Court in an opinion by Justice Brennan in *Parden v. Terminal Railway Company of Alabama State Docks Department*, 377 U.S. 194, 84 S.Ct. 1207 (1964), where a rule of the Terminal Railway Company was noted that provided:

> "Employee must not make any statement, either oral or written, concerning any accident, claim or suit in which the company is, or may be involved, to any person other than [an] authorized representative of the railroad, without permission, [*e*]*xcept in cases arising under the Federal Employers' Act, otherwise known as 'an act relating to the liability of common carriers by railroad to their employees in certain cases.'* " (emphasis added).

The Supreme Court stated that as to such rules, "[t]he exception for cases arising under the FELA is required by 45 U.S.C. §60." 377 U.S. at 196, 84 S.Ct. at 1215, footnote 14.

Rule R of the Southern Railway System is artfully drafted to discourage Railroad employees from giving information to others or their representatives regarding claims under the FELA. Such a regulation is facially

defective and, as applied in the context of respondent Hendley's case, constitutes flagrant violation of the legislative intent and purpose of Section 60, and the statutory prohibition. The gross error of the District Court was in ruling that after the conclusion of the *Razook* FELA case, Section 60 did not apply. It must be remembered that the purpose of Section 60 is also to stave off the chilling effect of retaliatory actions against prospective future witnesses in FELA claims protected by the Act. Rule R violates Section 60 and under the language of that Section "any . . . rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntary information to a person in interest as to the facts incident to the injury or death of any employee, shall be void . . ." This was the opinion and judgment of the court below, and no writ need be issued to disturb this well reasoned interpretation of law.

III.

The petitioner's theme is a familiar one: if the lower court decision stands, the nation's economy will falter. The petition assails the decision of the Court below as a "dangerous precedent" that will derail the entire grievance machinery of the Railway Labor Act. Do not be mislead. The Railroad acted to punish Hendley for furnishing information to a fellow employee and FELA claimant, and for once its motive was so obvious that it was caught violating the FELA provision that prohibits such action. The respondent doubts that such a

fact circumstance will ever recur. The holding of itself may serve to severely limit the number of instances where such a cause of action would arise in that it furthers the legislative purpose of Section 60 by making railroads more circumspect of the manner in which they would attempt to dampen the climate for FELA claims.

The Railway Labor Act machinery is not challenged by this decision and it in no way alters the present scheme of things. The Courts have always adjudicated legal issues concerning statutorily prohibited activity. Administrative agencies decide and resolve labor disputes under the Railway Labor Act. There is no overlap or entanglement caused here between the role of the Courts and that of the labor agreements process. The cases relied on by the petitioner, *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320, and *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290, are inapposite. *Andrews* dealt not with a person who was seeking protection of a statutory right under FELA Section 60, but a claim under the general law of contracts couched in a form to avoid jurisdiction under the Railway Labor Act. That decision has no bearing on the case at bar. Nor does *Farmer* offer any enlightening principle for the Court to apply here. In *Farmer* the Court was concerned with an allegation of tort injury under State law and merely restated long established principles that each government entity must do its part in keeping the regulatory scheme on track. Hendley seeks no damages in tort. He seeks to invoke the protection of Section 60 to keep the Railroad from firing him for furnishing information to a fellow employee,

union member, and an FELA claimant. If Section 60 does not afford that protection, it is worthless.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is sound and in keeping with well established case law, that is; Federal Courts interpret federal laws and Administrative Law Judges interpret matters arising under collective bargaining agreements between railroad management and the various unions. The decision of the lower appeals court merely reaffirms the fact that the interpretation of a Federal Statute is within the exclusive jurisdiction of the Federal Courts and such legal issues are without the jurisdiction of any administrative panel. The decision of the Fifth Circuit Court of Appeals clearly demonstrates that the issue presented is not the policy of Congress favoring arbitration of disputes under collective bargaining agreements, rather, the orderly, efficient flow of commerce free of illegal practices in violation of the laws of the United States of America. The petition for a writ of certiorari should be denied.

Respectfully submitted,

BILLY E. MOORE

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P. O. Box 2565
Columbus, Georgia 31902

CERTIFICATE OF SERVICE

The undersigned attorneys certify that on the ____ day of July, 1980, they served three copies of the foregoing Brief in Opposition to a Petition for Writ of Certiorari upon the opposing counsel by placing same in the United States Mail with proper postage affixed, addressed to:

Charles A. Horsky
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All parties required to be served have been served.

BILLY E. MOORE

B. RANDALL BLACKWOOD

APPENDIX A

SOUTHERN RAILWAY SYSTEM

OPERATING RULES

The rules herein set forth govern operations on the lines of Southern Railway System. The words "railroad" or "railway" or "Company" herein cover any company whose management by proper order makes these rules effective.

All previous Operating Rules applicable to System companies are hereby superseded. To the extent previous bulletin instructions or special instructions are inconsistent herewith, and only to that extent, they are hereby superseded.

Further instructions may be issued by proper authority.

L. S. Crane
Executive Vice-President,
Operations

Effective June 1, 1970
Revisions effective as dated

Page Revised
May 1, 1972

* * *

R. Employees must not divulge to any person other than the shipper, consignee or a duly authorized public officer, any information concerning shipments of freight, which information might be used to the disadvantage of the patrons of the railroad.

Information detrimental to the Company's interests must not be divulged except to proper officers or to others authorized to obtain such information.

APPENDIX B

SOUTHERN RAILWAY SYSTEM
Central of Georgia Railroad Company
P.O. Box 428
Savannah, Georgia 31402

December 1, 1977

Mr. J. E. Hendley
410 Delores Drive
Savannah, Ga. 31406

Dear Mr. Hendley:

Please arrange to report for formal investigation to be held in the Conference Room, Dillard Yard Office, Savannah, Ga., at 11:00 A.M. on Friday, December 2, 1977.

You are hereby charged with disloyalty to the Central of Georgia Railroad Company in that you accompanied and assisted Mr. Billy Moore onto the property of the Union Camp Corporation on an unknown date for the purpose of making photographs of Union Camp Corporation's property for use in a law suit against the Central of Georgia Railroad Company and Union Camp which is in violation of rule "R" of the book of operating rules of Southern Railway System.

You may have representatives and/or witnesses present at this investigation in your behalf, if desired, as provided by your schedule agreement.

Please acknowledge receipt of this letter by signing the attached copy.

Sincerely,

/s/ W. D. COGDELL
W. D. Cogdell
Sup't of Terminals